S. Rebuck
154112

Comptroller General
of the United States

Washington, D.C. 20548

1014174

Decision

Matter of: Gordon R.A. Fishman--Reconsideration

File: B-257634.2

Date: April 17, 1995

DECISION

Gordon R.A. Fishman requests reconsideration of our decision Gordon R.A. Fishman, B-257634, Oct. 11, 1994, 94-2 CPD ¶ 133, in which we dismissed Fishman's protest filed in connection with General Services Administration (GSA) solicitation for offers (SFO) No. GS-05B-15777, for rental office space.

We affirm the dismissal.

In our prior decision, we dismissed several of Fishman's arguments as untimely, including: (1) that the SFO improperly failed to include a preference for buildings located in a central business district (CBD); (2) that the SFO failed to include a provision to account for moving expenses in connection with the cost evaluation; and (3) that the agency improperly amended the SFO to change the space requirement from approximately 8,500 square feet to 10,250 contiguous square feet of usable space. We dismissed these three allegations on the basis that they concerned apparent solicitation improprieties, but were not raised until 6 months after the initial closing date; under our Regulations, such protests must be filed prior to the initial closing date. 4 C.F.R. § 21.2(a)(1) (1995).

In its reconsideration request, Fishman takes issue with our treatment of these three protest bases. First, Fishman maintains that, because it is alleging a violation of statute regarding the CBD issue--as opposed to what it describes as minor procedural infractions and informalities --we should consider the issue notwithstanding its untimeliness. However, the fact that an issue raised in a protest is based on an alleged violation of statute or regulation does not render our timeliness requirements inapplicable--all protest issues must satisfy our timeliness requirements, and generally will be dismissed if they do not. Under the significant issue exception to our timeliness requirements, 4 C.F.R. § 21.2(c), we may consider otherwise untimely protests where the issue is one of first impression that would be of widespread interest to the

procurement community. AGM Container Controls, Inc., B-255881, Apr. 12, 1994, 94-1 CPD ¶ 243. However, the exception does not apply here, since we have previously considered the question of whether an agency, in acquiring a leasehold interest in real property, is required to provide a preference for properties located in a CBD. See H&F Enters., B-251581.2, July 13, 1993, 93-2 CPD ¶ 16.

Second, Fishman maintains that its allegation concerning the SFO's lack of a moving cost adjustment was timely because it was raised in telephone conversations with GSA's contracting officer and an attorney in our Office well before the closing date for submission of initial offers. However, our Regulations, 4 C.F.R. § 21.1(b), require that protests be in writing; an oral allegation to either our Office or the contracting agency does not constitute a reviewable protest, and does not toll our timeliness requirements. White Water Assocs., Inc., B-253825, Aug. 26, 1993, 93-2 CPD ¶ 126.

Finally, Fishman maintains that our dismissal of the third issue--concerning the amendment increasing the amount of space required--was based on a misunderstanding of its argument. According to Fishman, it was not protesting this aspect of the SFO as a solicitation defect, but rather raised this as the latest in a series of actions taken by GSA to improperly exclude the firm from competing. Fishman claims it timely raised this allegation of bad faith in its comments on the agency report.

We did not misunderstand Fishman's argument. Fishman's contention relating to GSA's alleged bad faith was untimely because it was based on the agency's allegedly improperly including (or excluding) certain SFO provisions; Fishman essentially argued that the inclusion/exclusion of these provisions (such as the square footage requirement) evidenced agency bad faith. However, solicitation provisions generally are unobjectionable where they in fact reflect the agency's legitimate minimum needs. See Federal Acquisition Regulation § 10.0002; Shred Pax Corp., B-253729, Oct. 19, 1993, 93-2 CPD ¶ 237. It follows that, even where, as here, the protester maintains that the decision to include or exclude a requirement was made in bad faith and aimed at improperly limiting the competition, the validity of the allegation still is dependent upon whether the requirement reflects the agency's needs; if it is not first established that the requirement exceeds the agency's needs--and therefore is somehow improperly restrictive of competition--there simply is no basis for objecting to a procurement based on it.

We thus understood this aspect of Fishman's protest as challenging the propriety of the allegedly objectionable provisions based on its position that they were included

only because GSA was acting in bad faith toward Fishman. Because Fishman did not raise its challenge to the terms of the SFO in a timely fashion, however, there was no basis for our objecting to the provisions as exceeding the agency's needs. Since there was no timely challenge to the contents of the SFO, we had no basis to consider the allegation that the provisions were issued in bad faith.

Our decision is affirmed.

Robert P. Murphy
General Counsel